In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-9

LEROY N. BONKOWSKI, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Tax Court (Pet. App. 7-23) is reported at P-H Memo T.C., par. 70,-340. The opinion of the United States Court of Appeals (Pet. App. 1-6) is reported at 458 F. 2d 709.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1972. The petition for a writ of

certiorari was filed on June 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Whether the evidence is sufficient to support the finding that petitioner was not the owner of certain rental property during the taxable years in issue and, therefore, was not entitled to treat the expenses and income generated by this property as his own for various income tax purposes.

STATUTES INVOLVED

The pertinent portions of Sections 2, 151, 152 and 212 of the Internal Revenue Code of 1954, and of Section 9, Chapter 30, of the Illinois Revised Statutes are set forth in the petition. (Pet. 3-5.)

STATEMENT

Petitioner's mother owned the entire beneficial interest in the Bosworth property, rental property containing apartments and a store. (Pet. App. 2, 9-10, 12.) On January 1, 1964, she signed a document entitled "Affidavit", under which she purported to convey her interest in the Bosworth property to the petitioner. (Pet. 6; Pet. App. 3, 10-12.) The document was never recorded, however (Pet. App. 11), and petitioner's mother continued to treat the Bosworth property as her own. She obtained a mortgage on the property the following year. (Pet. App.

11.) On July 14, 1967, she executed a quitclaim deed conveying the Bosworth property to the petitioner, and this deed was recorded. (Pet. App. 11.)

Prior to 1964, petitioner's mother had treated the income and expenses generated by the Bosworth property as her own for tax purposes. (Pet. App. 14.) Beginning in that year, and in 1965 and 1966, petitioner deducted the expenses attributable to the property on his tax returns and claimed net rental losses in connection therewith. (Pet. App. 12-17.) He also claimed his mother as a dependent in 1964 and 1965. (Pet. App. 2, 7.) These actions were based on the theory that his mother had conveyed full ownership of the Bosworth property to him by executing the "affidavit." (Pet. App. 18.)

The Tax Court held that the "affidavit" was ineffective as a conveyance of property under Illinois law, and that, accordingly, petitioner was not entitled to report the income and expenses attributable thereto as his. (Pet. App. 18-22.) It also held that he could not claim his mother as a dependent or use head-of-household rates, since the Bosworth property belonged to his mother during these years. (Pet. App. 22-23.) The court of appeals affirmed the Tax Court's decision on the ground that it was supported by the record and that it was the result of a proper application of Illinois law. (Pet. App. 3-5.)

ARGUMENT

The judgment below is correct. There is no conflict or any other reason for further review.

It is well established that under the federal taxing scheme, where income from property is taxed to the owner thereof, state law is determinative of the question of ownership. *Poe* v. *Seaborn*, 282 U.S. 101, 109-110; *United States* v. *Mitchell*, 403 U.S. 190, 195. In the present case, the lower courts looked to Illinois law to determine whether petitioner rather than his mother owned the Bosworth property (and consequently the income and deductions generated by it) during the taxable years in issue. (Pet. App. 4, 19.) They found that although the instrument which was used purportedly to convey the property to petitioner in 1964 did not comply with the form of a quitclaim deed prescribed by Illinois statute (Smith-Hurd Ill. Ann. Stat., c. 30, Sec. 9 (Pet. 4-5)), Illinois courts accord greater regard to the actual intent of the parties. See, e.g., *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516, 30 N.E. 2d 24; *Schreier* v. *Chicago & N.W. Ry. Co.*, 96 Ill. App. 2d 425, 239 N.E. 2d 281. Resolution of the question presented, therefore, turned on the purely factual question of intent, as gathered from the language of the instrument as a whole, the circumstances surrounding its execution, and the situation and goals of the parties. *Shadden* v. *Zimmerlee*, 401 Ill. 118, 81 N.E. 2d 477; *Law* v. *Kane*, 384 Ill. 591, 52 N.E. 2d 212.

The Tax Court's finding that it was not the intent of the parties to effect a transfer of ownership in the Bosworth property but rather to enable petitioner to report the income and expenses attributable thereto as his own, and to claim his mother as

a dependent for tax purposes, is amply supported by the record. There is testimony in the record, for example, that petitioner's mother, out of concern for her other two sons, was unwilling to transfer ownership of the property to petitioner in 1964. (Tr. 20, 85.)[1] There is also testimony by the attorney who prepared the 1964 "affidavit" to the effect that he was aware that it would be ineffective to transfer title under Illinois law. (Tr. 86.) Moreover, the facts that the "affidavit" was never recorded (Pet. App. 11), that petitioner's mother, as owner of record, executed a mortgage on the Bosworth property a year later (Pet. App. 11), and that in 1967 she executed a recorded deed transferring the property to petitioner (Pet. App. 11), were properly considered by the Tax Court in arriving at its conclusion.[2]

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[1] "Tr." references are to the transcript of proceedings before the Tax Court. These portions of the transcript were not reproduced by petitioner in the record appendix which he prepared for use in the court of appeals.

[2] These factors were not, as petitioner asserts (Pet. 7-12), given controlling weight by the Tax Court. As noted by the court of appeals (Pet. App. 6), "these factors constituted evidence of the practical construction which the parties themselves placed upon the instrument in question," and "served only as collateral indicia of the actual intent of the parties." See *Shadden* v. *Zimmerlee*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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